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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 322

FRANCES VIVIAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, Frances Vivian, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 28, 1955. (R. 38.) (See Appendix E.)

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, dated June 28, 1955, is reported at ..... F. 2d ..... (adv. sheet). It is set out in the transcript of proceedings (R. 30-37) and is reproduced in full in Appendix F of this petition.

The Court of Appeals for the Seventh Circuit also rendered an opinion, dated January 3, 1955, accompanying

its order of that date overruling respondent's motion to dismiss the appeal herein. (R. 29.) (See Appendix C.) That opinion is reported at 217 F. 2d 882, is also set out in the transcript of proceedings (R. 25-28) and is reproduced in full in Appendix D of this petition.

The District Court did not render an opinion.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED.

1. Is a judicial proceeding brought to enforce an administrative subpoena in an investigation, pursuant to Section 235 (a) of the Immigration and Nationality Act of 1952, subject to the Federal Rules of Civil Procedure?

   (a) May a judicial order compelling testimony before the administrative agency be entered *ex parte*?

   (b) Does the District Court in such a proceeding obtain jurisdiction over the defendant witness without service of process?

   (c) Does such a judicial order compelling testimony, obtained *ex parte*, without notice and without service of process, violate the defendant witness' right to due process of law under the Fifth Amendment?

2. Does Section 235 (a) of the Immigration and Nationality Act of 1952 authorize compulsion of testimony in an administrative investigation concerning resident aliens or naturalized citizens, or is the statutory provision limited by its terms to cases of entry and exclusion?

   (a) Does Section 235 (a) authorize such compulsion of testimony where the subpoena, or the complaint, or, as here, both fail to state that the person

or persons being investigated are aliens or naturalized citizens?

(b) Does Section 235 (a) authorize compulsion of such testimony before an "Investigator"?

3. Is an administrative subpoena which fails to state the nature of the investigation in which the testimony is sought, unreasonably vague and burdensome?

4. In a judicial proceeding brought to enforce an administrative subpoena, is the complaint unreasonably vague and burdensome if it fails to make a showing of probable cause or to state the nature of the questions proposed to be propounded to the defendant witness?

5. Does subjecting everyone, even native-born citizens, to the summary and loose procedures of the Immigration Service on the mere allegation that their testimony is desired in some alleged investigation concerning someone alleged to be an alien or a naturalized citizen (or, *a fortiori*, where, as here, no allegation is made that the person or persons being investigated are either aliens or naturalized citizens)—particularly in an *ex parte* manner, without compliance with ordinary and customary procedural requirements—and without specifying the nature of the investigation and of the questions to be propounded, constitute an unreasonable search and seizure and an unlawful invasion of the privacies of life of the witness, violative of Fourth, Fifth and First Amendments to the Constitution?

STATUTES INVOLVED.

Immigration and Nationality Act of 1952, Section 235 (a) (8 U. S. C. A. Sect. 1225(a)). (See Appendix A of this petition.)

Federal Rules of Civil Procedure, Rule 81 (a) (3). (See Appendix B of this petition.)

Federal Rules of Civil Procedure, Rules 4 (d) (1). (See Appendix B of this petition.)

STATEMENT.

This proceeding to compel testimony in an administrative investigation purports to be brought under Section 235 (a) of the Immigration and Nationality Act of 1952 (commonly known as the McCarran-Walter Act) (8 U. S. C. A. Sect. 1225(a)).

This provision is found in Chapter 4 of Title II of the Act, which is entitled "Provisions Relating to Entry and Exclusion". The text of Section 235 (a) is reprinted in Appendix A at the end of this petition.

The complaint alleges (R. 3, 4) that in April, 1954, the defendant, Miss Frances Vivian, received from the Chicago office of the United States Immigration and Naturalization Service an administrative subpoena which stated that she was required to appear and give testimony pursuant to Section 235 (a) of the Immigration and Nationality Act. At the top of the subpoena was the following caption: "In re Henry Halsey Noyes and Gertrude Stedman Noyes." (R. 4, 5.) The subpoena, signed by Joseph A. Cushman, the Acting District Director, did not designate any person before whom the testimony was to be taken. (R. 4, 5.) The complaint further alleges that defendant has refused and neglected to obey the subpoena and give testimony. (R. 4.)

This action was filed on June 2, 1954 in the United States District Court for the Northern District of Illinois, Eastern Division, to compel defendant's obedience to the administrative subpoena. The complaint requests the court to order the defendant to appear before the Acting District Director of Immigration. (R. 3, 22.)

No service of summons upon defendant was attempted (R. 22, 23.) Nor was a copy of the complaint served upon defendant. (R. 22, 23.)

Instead, on the very same day the proceeding was filed, the Government, without any notice whatsoever to defendant, moved the court for entry of an *ex parte* order requiring defendant to appear and testify. (R. 5, 6, 22.)

An order was then entered *ex parte* by the District Court on the same day, requiring defendant to appear before the District Court on June 11, 1954, and give testimony. (R. 5, 6, 22.)

A copy of this *ex parte* order was thereupon served upon defendant by the United States Marshal. (R. 6, 7, 22.) The return by the Marshal was filed on June 7, 1954. (R. 6, 7, 22.)

Presentation with this *fait accompli* was the first notice that defendant had of the existence of this proceeding.

On June 11, 1954, defendant filed a motion to vacate the order of June 2, 1954, and to dismiss the complaint. (R. 8, 9, 23.) This motion was later amended and expanded. (R. 10, 11, 23.)

On September 17, 1954, the District Court entered an order denying defendant's amended motion to vacate and dismiss and further ordered defendant to appear before Joseph H. Kadlec, Investigator, Immigration and Naturalization Service, on October 1, 1954, to give testimony. R. 12, 23.)

Notice of appeal was thereupon filed by defendant. (R. 13, 14, 24.) The appeal was made a supersedeas by order of the District Court. (R. 14, 24.) A supersedeas bond in the amount of Five Hundred Dollars was approved by the District Court on October 1, 1954, and filed on the same day. (R. 15, 16, 24.)

A motion to dismiss the appeal as taken from a non-appealable order was filed by the Government. On January 3, 1955, the Court of Appeals for the Seventh Circuit

held that the order was appealable and denied the motion. (R. 29.) (See Appendix C.) This order was accompanied by an opinion written by Circuit Judge Lindley. *United States* v. *Vivian*, 7 Cir., 217 F. 2d 882. (R. 25-28.) This opinion is reproduced in full in Appendix D of this petition.

On June 28, 1955, the Court of Appeals affirmed the judgment of the District Court. (R. 38.) (See Appendix E.) The affirmance was accompanied by an opinion written by Circuit Judge Finnegan. (R. 30-37.) *United States* v. *Vivian*, 7 Cir., ... F. 2d ..... This opinion is reproduced in full in Appendix F of this petition.

REASONS FOR GRANTING THE WRIT.

Preface: This Court has granted writs of certiorari in and has now pending before it two cases concerning judicial proceedings to enforce administrative subpoenas, brought pursuant to the same statutory provision here involved—Section 235 (a) of the Immigration and Nationality Act of 1952. These cases are:

In re Minker, No. 625, October 1954 Term, certiorari granted April 11, 1955. 349 U. S. 904. (Opinion below: 3 Cir., 217 F. 2d 350.)

Falcone v. *Barnes*, No. 716, October 1954 Term, certiorari granted May 16, 1955. 349 U. S. 927. (Opinion below: 2 Cir., 219 F. 2d 137.)

The *Minker* and *Barnes* cases have to do with compelling testimony in an administrative investigation concerning a possible denaturalization proceeding. In the case at hand the investigation may relate to bringing possible deportation proceedings against resident aliens. (The persons alleged to be under investigation are not stated to be aliens or naturalized citizens either in the administrative sub

poena (R. 4, 5) or in the complaint. (R. 3, 4.) All these cases thus pose the question of the scope of Section 235 (a).

The procedural and constitutional questions raised by this petition do not appear in the *Minker* and *Barnes* cases, in which the issues are confined to interpretation of Section 235 (a).

I.

The Questions Presented by This Petition Are of Continuing Importance in the Administration of the Immigration and Nationality Act of 1952.

They Have Not Been, But Should Be Settled by This Court.

Section 235 (a) of the Act is new in the law. "In 1952 Congress rewrote the entire body of our statutory immigration and nationality laws. • • • The provision we are now construing is new language in the 1952 Act." *United States* v. *Minker*, 3 Cir., 1955, 217 F. 2d 350, 351. See also 66 Harvard L. Rev. 643, 665, 666 (1953).

Investigating is one of the most important activities of the Immigration and Naturalization Service. This is evident from the fact that even before the effective date of the present Act, on October 15, 1952, of the authorized force of 7,204 employed by the Service, some 907 were assigned to investigations. "Whom Shall We Welcome: Report of the President's Commission on Immigration and Naturalization" (1953), p. 257.

Under color of Section 235 (a) the Service is claiming here, and in a number of similar cases pending in the district courts, that each of these investigators is now equipped with the subpoena power, judicially enforceable, not only in matters of entry and exclusion—as both the arrangement of the statute and administrative history ap-

pear to limit it—but also in matters of deportation. (In the *Minker* and *Barnes* cases the claim is expressly extended to matters of denaturalization.)

The bounds of the legislative grant under this ambiguously drafted statute require authoritative delimitation by this Court.

The complaint states "that the Immigration and Naturalization Service is conducting an investigation relating to the right or privilege of Henry Halsey Noyes and Gertrude Stedman Noyes to remain in the United States" (R. 3, 4) and that this action is brought pursuant to Section 235 (a) of the Immigration and Nationality Act (8 U. S. C. Section 1225 (a)). (R. 4.)

Nowhere in the pleadings or the record is it stated that the Noyeses are either aliens or naturalized citizens. There is thus no showing that the Immigration and Naturalization Service has any jurisdiction whatsoever to conduct the alleged investigation. In consequence the administrative agency has failed to establish that it has any power to issue the subpoena against petitioner or enlist the aid of the District Court to enforce it.

The statement that the investigation relates to their "right or privilege to remain in the United States" does make it clear that the investigation does not concern entry or exclusion. Yet Section 235 (a) is not merely placed, but thoroughly embedded in that part of the Act dealing with entry and exclusion. The distinction between exclusion and deportation is fundamental in immigration law. Upon it depend varying and contrasting practices with respect to the alien before and after entry, premised upon the rights he acquires by the act of entry. In the light of the long historic background, it is unthinkable that if the Congress had actually intended to apply this potent instrument to the wide fields of deportation and denaturalizatio

it would have hidden it away in that portion of the Act which deals with the much narrower field of entry and exclusion.

The provisions of the part of the Act in which Section 235 (a) is located all pertain to entry and exclusion, not deportation. Section 231 provides for lists of alien and citizen passengers *arriving* or departing. Section 232 provides for the detention of aliens for observation and examination *upon arrival.* Section 233 provides for temporary removal of aliens for examination *upon arrival.* Section 234 provides for the physical and mental examination of aliens *upon arrival.* Section 235 (a), which contains the provision under which this action was brought, provides for inspection of aliens, including alien crewmen, seeking *admission* and *readmission* to or the *privilege of passing through* the United States and the examination of aliens *arriving* at ports. Section 235 (b) provides for the detention of aliens not clearly and beyond a doubt *entitled to land.* Section 235 (c) relates to temporary or permanent *exclusion.* Section 236 relates to *exclusions* of aliens. Section 237 provides for the immediate deportation of aliens *excluded from admission* or *entering* in violation of law. Section 238 relates to *entry* through or from foreign contiguous territory and adjacent islands and to *landing stations.* Section 239 relates to the designation of *ports of entry* for aliens *arriving* by civil aircraft. And the concluding Section 240 provides for records of *admission.*

Section 235 (a) contains some general language. In the Statutes at Large this reads so as to provide for the subpoenaing of witnesses and documents "relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act, and the administration of the Service." In the U. S. Code,

this passage contains the word "Chapter" instead of the word "Act".

Under the standard Ejusdem Generis Rule of statutory construction, where general words follow the designation of particular things or classes of persons or subjects, the general words will usually be construed to include only those persons or things of the same class or general nature as those specifically enumerated. Crawford on the Construction of Statutes (1940), § 191, pp. 326, 327; § 195, pp. 334, 335.

The elaborate commentary on the Immigration and Nationality Act published by the Harvard Law Review, entitled: "Developments in the Law Immigration and Nationality", 66 Harvard L. Rev. 643, 666, 691 (1953), is in accord with the result of this analysis.

Nor can it be reasonably argued that the rules of statutory construction do not apply on the ground that the general language is unambiguous. In determining whether or not the general language is ambiguous or not, the reasonable intention of the legislature must be considered. The isolation of this tiny particle of general language in a lake of provisions relating specifically and concretely to entry and exclusion is too striking, even startling to be ignored. The reasonable intention of the Congress in drafting this whole division of the statute is so obvious that it renders the few words of general language isolated in it ambiguous. The rules of statutory construction therefore are applicable.

> "All new laws, though penned with the greatest of technical skill and passed upon the fullest and most mature deliberation, are considered as more or less obscure and equivocal until their meaning be fixed and ascertained by a series of particular discussions and adjudications." Dwarris on Statutes, p. 49.

Settlement by the highest authority of this question, which threatens to arise in every investigation undertaken by the Immigration Service, is clearly in the public interest.

II.

The Court of Appeals Has So Far Sanctioned Such a Departure from the Accepted and Usual Course of Judicial Proceedings by the District Court, as to Call for an Exercise of This Court's Power of Supervision.

The Court of Appeals Has Here Decided a Federal Question in Conflict With the Applicable Decisions of This Court.

The Court of Appeals overruled the contention of the petitioner that the District Court lacked jurisdiction over her because of lack of service of process. (R. 35, 36.) This decision of the Court of Appeals was based upon two mutually inconsistent grounds:

(1) That Rule 81 (a) (3) of the Federal Rules of Civil Procedure, which provides that the Federal Rules of Civil Procedure "apply to proceedings to compel the giving of testimony * * * in accordance with a subpoena issued by an officer or agency of the United States" * * *"except as otherwise provided by statute of the United States" (see Appendix B) does not render this proceeding subject to the Federal Rules of Civil Procedure, because, in the language of the opinion of the Court of Appeals:

> "§ 235 (a) is a statute within Rule 81 that provides for the procedure followed here and we do so hold." (R. 36.)

Section 235 (a) in fact sets forth no such procedure. It merely authorizes the agency to seek the aid of the court. (See Appendix A.) Nor is there anything providing other-

wise in the Rules of the District Court in which the proceeding was brought. Nor was any order entered by the District Court in these proceedings exempting this particular action from the Federal Rules of Civil Procedure.

(2) The Court of Appeals rejected what it termed the thesis of petitioner that this is "a *de novo* civil action" commenced against her (R. 36) and for this gave the following reason:

> "It would frustrate the theory and purpose of § 235 (a) if every rejected subpoena would have to be subjected to a separate civil proceeding accompanied by issuance of process bottomed on a complaint. Pyramiding summonses on subpoenas serves no useful purpose. * * * To construe the judicial aid mentioned in § 235 (a) as requiring resort to instituting a new lawsuit requiring service of process, at its threshold, would frustrate the clear purpose of § 235 * * * On her" (Vivian's) "theory every witness could forestall the government and force it to institute as many lawsuits as there are witnesses in any given case." (R. 36.)

The fact of the matter is that the Government, in order to compel the testimony of petitioner in the administrative investigation, did file in the United States District Court for the Northern District of Illinois "a separate civil proceeding" entitled *United States* v. *Vivian*, No. 54 C 794. (R. 3, 22.)

The District Court would not have had jurisdiction over the subject matter unless the judicial proceeding to enforce the administrative subpoena were a "case" or "controversy" within the Constitutional requirement, which it is. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 489. See also *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434.

The holding of the Court of Appeals that this proceeding is not an independent lawsuit is in direct conflict with the

applicable decisions of this Court. In *Cobbledick* v. *United States,* 309 U. S. 323, Mr. Justice Frankfurter, writing for this Court, stated of a similar provision in the Interstate Commerce Act for the judicial enforcement of administrative subpoenas:

> "A proceeding like that under Section 12 of the Interstate Commerce Act *may be deemed self-contained,* so far as the judiciary is concerned,—*as much so as an independent suit in equity* in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself." (330.) (Emphasis supplied.)

The statute construed by this Court in the *Brimson, Ellis* and *Cobbledick* cases—Section 12 of the Interstate Commerce Act—"is, in all material respects, identical with that involved in the case at bar," as the Court of Appeals stated by Circuit Judge Lindley in denying the Government's motion to dismiss the appeal herein. (R. 26.) *United States* v. *Vivian,* 7 Cir., 1955, 217 F. 2d 882, 883. The opinion of the Court of Appeals in affirming the judgment therefore contradicts its own earlier opinion in denying the motion to dismiss the appeal.

The language in the final opinion below, stating that "Pyramiding summonses on subpoenas serves no useful purpose," etc. (R. 36), seems distinctly inapposite. As this Court declared in *Kotteakos* v. *United States,* 328 U. S. 750, 773:

> "Our government is not one of mere convenience or

> efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections. * * * About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The opinion below amounts to a holding that it is not requisite that a court acquire jurisdiction over the person of a defendant before entering judgment against him, if doing so would be inconvenient.

III.

The Opinion of the Court of Appeals Clearly Envisages Judicial Enforcement of Administrative Subpoenas as a Mere Routine Ministerial Function. It Brushes Aside as Impractical and Time-Consuming the Effort of the Witness to Make Appropriate Defense to the Vague and Oppressive Subpoena and Complaint.

This Conflicts With Numerous Decisions of This Court and With the Settled Policy of the Congress.

The statute under which this action has been brought—Section 235 (a) of the Immigration and Nationality Act (see Appendix A)—does not confer upon the Immigration Service the power to enforce its own subpoenas, but confines that function to the District Courts. This is but an instance of the steady policy which the Congress has followed as to administrative subpoenas since 1893. See the remarks of Mr. Justice Frankfurter in *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, 603, 604. Clearly the Congress did not intend the judicial enforcement of administrative subpoenas—in itself a "case" or "controversy" in the constitutional sense, *I. C. C.* v. *Brimson*, 154 U. S. 447, 489—to be a mere routine ministerial function.

This Court, despite the broadening of scope permitted in administrative subpoenas in recent years, consistently

holds that appropriate defense may be made to application for their enforcement. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 49. The scope, though broad, must be clearly defined; otherwise the inquiry becomes a mere roving, dragnet inquisition.

The following objections, which were all raised below, are, among others, valid defenses: that the hearing is not of the kind authorized by the statute (*Jones* v. *S. E. C.*, 298 U. S. 1, 26; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 201, 217); improper issuance of the particular subpoena, *Cudahy Packing Co. of Louisiana* v. *Holland*, 315 U. S. 357); that the subpoena and complaint are vague and unreasonably burdensome, *Bowles* v. *Abendroth*, 9 Cir., 151 F. 2d 407; that the subpoena and complaint fail to show on what ground the alleged investigation is being conducted, *Jones* v. *S. E. C.*, 298 U. S. 1, the witness having a right to know this so that she can determine if the questions propounded to her are relevant; and that the subpoena and complaint contain no showing of probable cause, or reasonable ground to believe that there is a violation of the law. *Bowles* v. *Insel*, 3 Cir., 148 F. 2d 91.

Although the administrative subpoena in the case at hand (R. 4, 5) fails to state on what ground and under what section of the voluminous and complex immigration laws the investigation is being conducted, the Court of Appeals did not deign even to discuss this defense. (R. 37.)

The opinion below clearly envisages judicial enforcement of administrative subpoenas as a mere routine act by the agency "to infuse vitality into its subpoena by aid of a district court." (R. 35, 36.) With pronounced force it rejects as impractical the doctrine that this is a full-fledged judicial proceeding. (R. 36.) This, we submit, is irreconcilable with the teachings of this Court.

IV.

The Studiedly Vague Administrative Subpoena and the Unnecessarily and Obstinately Ex Parte Character of the Enforcement Proceeding Disclose a Deliberate Attempt to Infringe Upon Constitutional Guarantees Against Unreasonable Searches and Seizures Which Calls for Active Discouragement by This Court.

The cryptic administrative subpoena, the studied refusal to specify the grounds upon which the alleged investigation is being conducted, the vague complaint, the *ex parte* character of the order to testify, the stubborn refusal even to attempt service of process, indifference as to the customary requirements of the court's obtaining formal jurisdiction over the person of the defendant, the obstinate silence as to any justification for this extraordinary mode of proceeding, culminating in the order, under pain of contempt of court, to testify before an "Investigator"—all these combine to form an unmistakable and, we submit, deliberate pattern.

The total effect of it all, if upheld, is to make anyone and everyone subject to the summary and loose procedures of the Immigration Service on the mere pretext that their testimony is desired in an alleged investigation concerning someone alleged to be an alien or naturalized citizen.*

The words of Justice Story, enunciated long ago in his "Equity Pleading" (1840), sec. 325, and quoted with approval by this Court in *Jones* v. *S. E. C.*, 298 U. S. 1, 27, are most apt:

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without

* In the case at bar the persons stated to be the object of investigation are not even alleged to be aliens or naturalized citizens. (R. 3-5.)

any allegations, upon no fixed principles, and governed by no rules of law, or of evidence and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

But a few years ago this Court reiterated in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 651, 652:

> "* * * The 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men', Brandeis, J., dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, at 478, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process. *Boyd* v. *United States*, 116 U. S. 616; *Hale* v. *Henkel*, 201 U. S. 43, 70." (Jackson, J.)

The administrative and judicial proceedings herein in their totality infringe immediately and directly upon petitioner's rights under the Fourth and Fifth Amendments and ultimately, but no less directly and immediately, upon her rights to the freedoms guaranteed by the First Amendment.

CONCLUSION.

For the foregoing reasons it is urged that a Writ of Certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner.

Dated: August 12, 1955.

APPENDICES.

APPENDIX A.

Statute Involved.

Section 235 (a) of the Immigration and Nationality Act of 1952 (popularly known as the McCarran-Walter Act) (66 Stat. 198, 199; 8 U. S. Code, Sect. 1225 (a)) appears under Title II of said Act, entitled "Immigration", and under Chapter 4 thereof, sub-titled "Provisions Relating to Entry and Exclusion." It states:

"Inspection by Immigration Officers.

"Sec. 235 (a). The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of

the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer, or special inquiry officer, produce books, papers and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

APPENDIX B.

(a) Federal Rules of Civil Procedure, Rule 81 (a) (3):

"These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings and (2) to appeals in such proceedings."

(b) Federal Rules of Civil Procedure, Rule 4:

"*Process,*

"(a) *Summons; Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. • • •

"(c) *By Whom Served.* Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose. • • •

"(d) *Summons; Personal Service.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

"(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

APPENDIX C.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Monday, January 3, 1955

Before

Hon. F. RYAN DUFFY, *Chief Judge.*

Hon. WALTER C. LINDLEY, *Circuit Judge.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11313 *vs.*

FRANCES VIVIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

This matter comes before the Court on the motion to dismiss appeal, the answer thereto, and briefs of counsel for the parties.

On consideration whereof, it is ordered that the order entered by the United States District Court from which this appeal was taken is an appealable order and, therefore, the motion to dismiss this appeal is hereby DENIED.

APPENDIX D.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11313. October Term and Session, 1954.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANCES VIVIAN,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 3, 1955.

ON MOTION TO DISMISS APPEAL.

Before DUFFY, *Chief Judge,* and LINDLEY, *Circuit Judge.*

LINDLEY, *Circuit Judge.* Defendant appeals from an order of the District Court commanding her to appear before the District Director of Immigration, in compliance with a subpoena issued by the Director under Section 235(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. § 1225 (a), to give testimony in an inquiry relative to the right of certain aliens to remain in the United States.

When served with the administrative subpoena, defendant refused to comply. On June 2, 1954, the United States filed this action under Section 235 (a) of the Act praying an order to compel defendant to comply with the

command of the subpoena. On the same day the court entered an order commanding defendant to appear before the court on June 11 to give such testimony. When served with this order, defendant moved to dismiss the complaint on various grounds and for an order quashing the earlier one of June 2. These motions were denied by the court on September 17, 1954, although the prior order was modified to command defendant, on a day certain, to appear before the appropriate administrative officer rather than before the court. By order of the trial court, the appeal was made a supersedeas.

The government moves to dismiss the appeal on the ground that the order of which complaint is made is not final within the meaning of 28 U. S. C. A. § 1291. The government's position is that an order of the district court, under the pertinent provisions of the Act, is not final action by the court until and unless the defendant recusant witness is cited in contempt of court.

This premise is not well founded. The issue must be resolved in terms of the jurisdiction granted to the district courts by the Act. Under Section 235 (a), on refusal of a witness to respond to a subpoena issued thereunder, the courts are empowered to "issue an order requiring such person" to appear. Disobedience to such an order may be punished "by the court as a contempt thereof." We do not interpret the statute as making the initial order and a contempt proceeding which might follow disobedience thereto part and parcel of the same action. On the contrary, when the court has entered its order compelling the recusant witness to testify the original proceeding comes to an end. A contempt proceeding, if necessary, would require a separate petition.

The statute construed by the Supreme Court in *Ellis* v. *ICC*, 237 U. S. 434, is, in all material respects, identical

with that involved in the case at bar. See 49 U. S. C. A. § 12 (2) and (3). The defendant there refused to comply with a subpoena issued by the ICC to compel him to testify and produce certain books and records. He appealed from an order of the district court directing him to comply. The court held that that order was final and appealable; that it was the end of the proceeding brought against the witness, notwithstanding the provision of Section 12 (3) of the Interstate Commerce Commission Act that failure of such a witness to obey the order of an appropriate court was punishable as a contempt. The *Ellis* case is controlling on the issue before us.

The authorities upon which the government relies are inapposite. In *Catlin* v. *United States*, 324 U. S. 229, the Court held only that an appeal would not lie from a judgment entered on a declaration of taking in a condemnation proceeding prior to final adjudication of the whole controversy. Our decision in *Jarecki* v. *Whetstone*, 192 F. 2d 121, that an order by a district court compelling the defendant to appear before the Collector of Internal Revenue was not final and appealable rests on the specific provisions of 26 U. S. C. A. § 3615 (e). Unlike the enforcement proceeding provided by the statute before us, a proceeding under the Internal Revenue Code to compel a recusant witness to testify is an application *"for an attachment [against such witness] as for a contempt."* 26 U. S. C. A. § 3615 (e). (Italics supplied.) The court is charged with the duty, on a satisfactory showing, to issue an attachment for the arrest of such person and is empowered, after a proper hearing, "to make such order as he shall deem proper not inconsistent with the law for the punishment of contempts, to enforce obedience to * * * the summons and to punish such person for his default or disobedience." *Ibid.* Thus the action brought against Whetstone was a contempt proceeding which

could be terminated only on an adjudication of the issue of contempt. We held that an appeal would not lie from an order issued in the sound discretion of the court to permit her to purge herself of the contempt without the necessity of a formal adjudication. This was a preliminary order which merely deferred consideration of the merits of the cause.

Stated differently, in *Whetstone*, contempt of the authority of the administrative body was the issue raised by the government's application. In the proceeding now before us, the jurisdiction of the district court extends only to the issue of compliance or non-compliance with the administrative subpoena. Contempt is not in issue until and unless the defendant fails to comply with the order of the court. Even then the issue becomes one of contempt of the court, an inquiry which is separate and distinct from the issues joined on the merits of the enforcement proceeding.

This distinction was pointed up by the Court in *Cobbledick* v. *United States*, 309 U. S. 323. In distinguishing the line of authorities exemplified by the decision in the *Ellis* case, *supra*, Mr. Justice Frankfurter said, at pages 329-330: "In these cases [citing *Ellis* and others] the orders of the district court directing the witness to answer have been held final and reviewable. * * * 'It is the end of a proceeding begun against the witness'—was the pithy expression for this type of case. 237 U. S. at 44[illegible] * * * The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under Section 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned,—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before

the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offended witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself."

The other authorities cited by the government do not militate against the conclusions expressed herein. As we have indicated, it is immaterial that the court may, if its order is not obeyed, adjudge defendant in contempt in a separate proceeding under the statute. *Ellis* v. *ICC, supra.*

The order is appealable and the motion to dismiss is denied.

APPENDIX E.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11313 *vs.*

FRANCES VIVIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby,

AFFIRMED.

APPENDIX F.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11313. October Term, 1954, April Session, 1955.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANCES VIVIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 28, 1955.

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* A subpoena issued by the Acting District Director of the Immigration and Naturalization Service, Chicago, Illinois, underlying this appeal, was served upon defendant, Vivian, April 2, 1954. She appeared in response to it; was granted a continuance until April 13, 1954, when she again appeared and refused to testify. By filing a complaint to compel Vivian's obedience to that subpoena, the government sought aid from the district court under § 235 of the Immigration and Nationality Act of 1952 [66 Stat. 198, 8 U. S. C. § 1225(a)]. That complaint, invoking § 235, was not served upon Vivian, nor was process, mentioned by Rule 4, Fed. R. Civ. Proc., 28 U. S. C. A., issued in connection with it. In

his order, entered *ex parte*, the trial judge directed defendant to appear in the court below and "* * * give testimony in compliance with the mandate of the said subpoena * * *" A certified copy of this judicial order was then served on defendant, June 4, 1954, by the United States Marshal.

About a week later Vivian, acting through private counsel, interposed a motion to: (i) dismiss the government's complaint and, (ii) vacate the June 2, 1954 order. Subsequently this motion was implemented by amendment and memorandum of law. Defendant appeals the district court's order, entered September 17, 1954 after arguments of counsel, overruling her motion and further providing:

> "that the defendant * * * appear before Joseph H. Kadlec, Investigator, Immigration and Naturalization Service, Room 934 * * * and then and there to give testimony in an investigation relating to Henry Halsey Noyes and Gertrude Stedman Noyes, pursuant to Section 235(a) of the Immigration and Nationality Act of 1952."

Congress granted power to subpoena, and provided for enforcement of such conferred power, in § 235, of the Act:

> "* * * The Attorney General and *any immigration officer, including* special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from *any person* touching the privilege of any alien or person he believes or suspects to be an alien *to enter, reenter, pass through, or reside* in the United States *or* concerning any matter which is material and relevant *to the enforcement of this* Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items

of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The *Attorney General and any immigration officer,* including special inquiry officers, *shall have power* to require by *subpoena* the attendance and testimony of *witnesses before immigration officers* and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States *or concerning any matter which is material and relevant to the enforcement of this* **Act** and the administration of the Service, *and to that end may invoke the aid of any court of the United States. Any United States district* court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer, may, *in the event of neglect or refusal to respond* to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, *issue an order requiring such persons to appear before an immigration officer or special* inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof." (Emphasis ours.)

Manifestly defendant's critical attack on 8 C. F. R. § 1.1(9)(i) and (ii), as constituting attempted delegation of administrative subpoena power, is unpersuasive. Because, the import of the nomenclature "immigration officer" employed in § 235, is derived first from this phraseology in § 101(18), of the Act itself:

> "The term 'immigration officer' means any employee or class of employees of the Service of the United States designated by the Attorney General, individually *or by regulation, to perform the functions* of an *immigration officer* specified by this Act or any section thereof." (Italics supplied.)

8 C. F. R.[1] § 1.1, (9)(i) and (ii) follow:

"§ 1.1 * * * The terms defined in section 101 of the Immigration and Nationality Act *have the same meanings* ascribed to them in that section and as supplemented, explained, and further defined in this chapter." (Italics added.)

"The term 'immigration officer' means:

"(i) Any officer or employee of the Service who, on December 24, 1952, was serving under appointment theretofore made to the position of * * * investigator * * * whose appointment has not terminated, or who hereafter is appointed to such position; and

"(ii) Any person designated by the Commissioner to perform the duties and exercise the powers of an immigration officer as set forth in the Immigration and Nationality Act."

Congress placed the designating power in the hands of the Attorney General and we refuse to strike down the relevant statutory sections because his appointees, or delegates might possibly be unqualified or selected from varying levels of workers. We take a dim view of the defendant's argument that the designating authority is conferred in such vague and indefinite language as to be violative of due process and in contravention of the Fifth Amendment. Necessarily enforcement and administration of this comprehensive piece of legislation requires considerable manpower and we think it unnecessary that Congress constitute itself a personnel bureau and set up job descriptions replete with all the myriad details of occupational qualifications. Sustaining the rent control aspects of the Emergency Control Act of 1942 [56 Stat. 23, 50 U. S. C. App. (Supp. II) § 901] the Supreme Court speaking through Mr. Justice Douglas, observed in *Bowles* v. *Willingham*, 321 U. S. 503, 515 (1944):

"We recently stated in connection with this problem

1. See; c. 417, 49 Stat. 500 for the establishment of the Federal Register, provision requiring publication, and filing of copies for publication with the National Archives Establishment. 44 U. S. C. A. § 307. Such filing constitutes constructive notice of the contents of documents deposited in compliance with the statute. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380 (1947).

of delegation, 'The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impractical' * * * In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. * * * Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue * * *."

Subsequent litigation has given narrow reading to *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357 (1942) cited by defendant in support of her contentions launched against subdelegation of subpoena power. See: *Fleming* v. *Mohawk Wrecking and Lumber Co.*, 331 U. S. 111 (1947), *Edwards* v. *N. L. R. B.*, 189 F. 2d 970 (5th Cir. 1951). But we think there is absent any issue of subdelegation, in this case, since as already pointed out the basic subpoena involved was signed by the Acting District Director. Now defendant simply blurs her point by asserting that the district judge has ordered her appearance before an "investigator" of the Service. If Vivian contends, as we think she does, that the language of § 235 (a) inhibited the district court's action because the word "investigator" is unmentioned by § 235(a), she is mistaken in light of § 101(18) and the quoted regulations. A familiar canon of construction requires that the meaning of a statute is to be looked for in all its sections taken together and in that posture related to the end in view. *Cherokee Intermarriage Cases*, 203 U. S. 76, 89 (1906). It would sap life from the Immigration and Nationality Act if we agreed that constriction of the designating power was essential to validity of the subpoena authority. There must be some sensible grant-

ing of that authority coupled with enough elasticity to foresee and cope with daily problems confronting administrators of the Act. We think the legislation involved survives defendant's attack and is unimpaired in the respects suggested by Vivian.

Because Vivian's testimony is sought merely as a witness in contradistinction from status as a party, we say that although certiorari was granted, April 11, 1955, by the Supreme Court in *United States* v. *Minker*, 217 F. 2d 350 (3rd Cir. 1955), it is unnecessary to await a decision in that case. While neither party before us cited the *Minker* case, we were cited, by the government, to *Application of Barnes*, 219 F. 2d 137 (2d Cir. 1955) in which, we now find, certiorari was also allowed, May 16, 1955. The *Minker* case is cited by the Second Circuit in the *Barnes* opinion. Because *Barnes* is awaiting review we refrain from relying upon it and prefer to decide Vivian's appeal without reference to *Barnes*. We are aware that *Barnes* involved a question whether the subpoena power found in § 235(a) extends to cases where a decree of denaturalization is sought under § 340 of the Act.

Vivian pursues a different tangential excursion from § 235(a). She contends that the complaint shows her testimony is sought in connection with "* * * an investigation relating to the right or privilege of Henry Halsey Noyes and Gertrude Stedman Noyes to remain in the United States" and, that deportation proceedings are outside the ambit of § 235(a), which refers to entry and exclusion. Defendant's thesis is erected upon the title of chapter 4, in which § 235(a) is found, viz: "Provisions Relating to Entry and Exclusion." By her argument defendant envisages § 235(a) in isolation.

But defendant's argument is quickly repelled by examining parts of § 235(a) as printed in 66 Stat. 198-199, and quoted earlier in this opinion. By force of 65 Stat. 711

(1951) the United States Statutes at Large "• • • shall be legal evidence of laws • • • in all the courts of the United States • • •" Though *Stephen* v. *United States*, 319 U. S. 423, 426 (1943) was decided prior to 61 Stat. 638, providing that the "United States Code is *prima facie* the laws of the United States," it was there said:

> "By 1 U. S. C. § 54(a), the Code establishes 'prima facie' the laws of the United States. But the very meaning of *'prima facie'* is that the Code cannot prevail over the Statutes at Large when the two are inconsistent • • • (citing) • • •"

Defendant's argument virtually hangs on the word and reference to this *"Chapter"* appearing in the United States Code version of § 235(a); (8 U. S. C. § 235(a), and duplicated in 8 U. S. C. A. § 1225) in lieu of this *"Act"* which is the actual word quoted above from the Statutes at Large. Consequently extensive discussion about restricting § 235(a) within the bounds of Chapter 4, is unwarranted. By employing "Act," instead of "Chapter," we think Congress has made it clear that § 235(a) applies to deportation proceedings under the Immigration and Nationality Act[2] of 1952.

One other facet of defendant's appeal should be discussed. She relies on Rule 81(a)(3), Fed. R. Civ. Proc., 28 U. S. C. A. as mandating adherence to the Rules of Civil Procedure even in instances such as this where the Immigration and Nationality Service seeks to infuse vitality into its subpoena by aid of a district court. While

2. Our view is consistent with the preamble, 66 Stat. 163 *i. e.*, "That this *Act*, divided into titles, chapers, and sections according to the following table of contents, may be cited as the 'Immigration and Nationality Act.'"

Apparently the variance between *Act* and *Chapter* found in the Statutes at Large and both the United States Code and 8 U. S. C. A. § 1225 escaped the notice of counsel for the government and defendant. Phraseology consistent with 66 Stat. 198-199 is also found in Laws Applicable to Immigration and Nationality, 66 (1953) published by the Department of Justice and 1 U. S. Code Cong. Admn. News, 198 (1952). Title 8, Aliens and Nationality has not yet been enacted into positive law. See: Preface to U. S. C. Supp. I (1952 ed.).

her argument rests on Rule 81(a)(3) it conveniently ignores the following italicized lines found in that Rule:

> "* * * These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States *except as otherwise provided by statute of the United States or* by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings." (Italics supplied.)

In short Vivian contends that a summons and service of process should have been served upon her as though the government's complaint were a *de novo* civil action commenced against her. But § 235 is a statute within Rule 81 that provides for the procedure followed here and we so hold. Section 235 differs significantly from the provisions involved in *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (1942) on which defendant relies, and is, for that reason, inapposite. It would frustrate the theory and purpose of § 235(a) if every rejected subpoena would have to be subjected to a separate civil proceeding accompanied by issuance of process bottomed on a complaint. Pyramiding summonses on subpoenas serves no useful purpose. Indeed, here, Vivian received a judicial hearing below, at one stage, before the order appealed was entered. This is consonant with the reasoning of Judge Lindley in *United States* v. *Vivian*, 217 F. 2d 882, 883 (1955).

Application to the district court was the statutory (§ 235) method of enforcing a subpoena by an order of court decreeing compliance. Clearly, enforcement by such an order ought to be a sure expeditious way of gaining obedience because disregard of the district court's order constitutes contempt. To construe the judicial aid mentioned in § 235 as requiring resort to instituting a new lawsuit requiring service of process, at its threshold,

ould frustrate the clear purpose of § 235. Again we point at Vivian is only sought as a witness and in an entirely ifferent proceeding against other persons now awaiting er attendance to give testimony. On her theory every itness could forestall the government and force it to in-itute as many lawsuits as there are witnesses in any iven case.

Because we singled out several items in defendant's rief for particular treatment in this opinion is by no eans an indication that defendant's other points have een overlooked. Quite the contrary for on close study of ll her asserted propositions only those discussed by us, ere, merited even this much attention.

Absence of reversible errors compels affirmance of the judgment appealed.

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 322

FRANCES VIVIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 29–37) is not yet reported. A previous opinion denying the government's motion to dismiss the appeal (Pet. 23–27) is reported at 217 F. 2d 882.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1955 (Pet. 28). The petition for a writ of certiorari was filed August 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 235 (a) of the Immigration and Nationality Act of 1952 authorizes an immigration officer to subpoena a witness to testify in connection with an administrative investigation into the right or privilege of certain identified resident aliens to remain in the United States.

2. Whether an application to the district court for an order enforcing compliance with the subpoena issued pursuant to Section 235 (a) must be by formal civil action instituted by a summons under the Federal Rules of Civil Procedure.

3. Whether the subpoena sufficiently apprised petitioner of the subject-matter of the investigation which the Immigration and Naturalization Service was then conducting and of the statutory authority under which it was being conducted.

STATUTE INVOLVED

Section 235 (a) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, provides in pertinent part:

> * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the

United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals (Pet. 28) affirming an order entered on September 17, 1954, by the United States District Court for the Northern District of Illinois (R. 12), compelling her to appear before a designated investigator of the Immigration and Naturalization Service and to give testimony in a pending administrative investigation of the right of Henry and Gertrude Noyes to remain in the United States which was being conducted pursuant to Section 235 (a) of the Immigration

and Nationality Act of 1952. The facts pertinent to the issues raised may be summarized as follows:

On April 2, 1954, a subpoena was issued and signed by the Acting District Director of the Immigration and Naturalization Service commanding that petitioner appear on April 7, 1954, at a specified place in Chicago, Illinois, and give testimony in an administrative investigation identified on the subpoena as "In re Henry Halsey Noyes and Gertrude Stedman Noyes." Petitioner was served in person with the subpoena the same day (R. 4–5). After being granted a continuance to April 13, 1954, petitioner appeared at the place designated but refused to testify (R. 6, 7).

On June 2, 1954, the United States Attorney presented to the district court *ex parte* a "Complaint to Compel Obedience to Subpoena" alleging the refusal of the petitioner to testify and praying that the court issue an order pursuant to Section 235 (a) of the Immigration and Nationality Act requiring her to appear in obedience to the subpoena (R. 3–4). The district judge issued an order requiring that petitioner appear before him at ten o'clock on June 11, 1954, to give testimony pursuant to the subpoena (R. 5–7). A certified copy of this writ was served on petitioner by a United States Marshal on June 4, 1954 (R. 8). On June 11, 1954, petitioner filed a motion to dismiss the "complaint" and to vacate the order of June 2, 1954, arguing in essence that the Federal Rules of Civil Procedure require

that compliance with such a subpoena be secured through a formal civil action rather than through motion to the court on an *ex parte* application (R. 8–9). In an amended motion filed on July 30, 1954, petitioner raised the additional contention that the subpoena power granted to service officers by Section 235 (a) of the Immigration and Nationality Act of 1952, *supra*, is inapplicable to administrative investigations of deportability (R. 10–11). After oral hearing the court denied the motion on September 17, 1954, and directed petitioner to appear on October 1, 1954, before a specified investigator of the Immigration and Naturalization Service to give testimony in the pending investigation (R. 12).

Petitioner appealed from that order (R. 14–16). The government's motion to dismiss the appeal on the ground that the order was not final was denied on January 3, 1955. *United States* v. *Vivian*, 217 F. 2d 882 (C. A. 7) (Pet. 22–27). The Court of Appeals proceeded to hear the appeal on its merits, and unanimously affirmed the opinion of the district court (Pet. 28–37).

ARGUMENT

1. Petitioner contends that the power conferred on the Attorney General and officers of the Immigration and Naturalization Service by Section 235 (a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3) "to require by subpena the attendance and testimony of witnesses before im-

migration officers * * * relating to the privilege of any person to * * * reside in * * * the United States or concerning any matter which is material and relevant to the enforcement of this Act and the Administration of the Service * * * ", does not grant authority to subpoena witnesses in connection with an investigation into the possible deportability of resident aliens.

This is not, as petitioner contends (Pet. 7), a novel question. Section 16 of the Immigration Act of 1917 (c. 29, 39 Stat. 885, 8 U. S. C. 1946 ed., 152) provided for the issuance of subpoenas by district directors and inspectors in charge for matters "touching the right of any alien to enter, reenter, *reside in,* or pass through the United States." [Emphasis supplied.]

Under that section the subpoena power was deemed to extend to investigations of possible deportability, as against the contention that it should be confined solely to entry or exclusion matters, since deportation relates to the right to reside in this country. *Azzollini* v. *Watkins,* 172 F. 2d 897, 899 (C. A. 2); *Graham* v. *United States,* 99 F. 2d 746, 748–749 (C. A. 9); *Loufakis* v. *United States,* 81 F. 2d 966, 967 (C. A. 3). Under Section 235 (a) of the 1952 Act the subpoena power still applies to matters touching the right of persons to "reside in * * * the United States", and is more broadly granted to the Attorney General and designated officers of the Service for use "concerning any matter which is material and relevant

to the enforcement of this Act and the administration of the Service". Clearly the broader language of Section 235 (a) in the 1952 Act should not be given a more narrow interpretation than the precursor provision in the 1917 Immigration Act.

The questions presented before this Court in *United States* v. *Minker*, No. 35, this Term, and *Falcone* v. *Barnes*, No. 47, this Term, as to whether the subpoena power extends to investigations relating to naturalized *citizens* and whether the person under investigation may be summoned, are not here involved. The investigation here relates to the right of *aliens* to continue to reside in the United States, and petitioner is being called as a witness and is not herself under investigation.

While tacitly conceding that the express statutory language would seem to grant the subpoena power sought to be exercised against her, petitioner attempts to circumscribe the express meaning and application of the subpoena provision by virtue of its placement in the 1952 Act under a chapter headed "Entry and Exclusion" (Pet. 8–10). As is argued in more detail in the brief for the government in the *Minker* case (No. 35, this Term, pp. 15–29), whatever value captions and headings may have in resolving patent ambiguities they "cannot limit the plain meaning of the text", *Brotherhood of Railroad Trainmen* v. *B. & O. R. R. Co.*, 331 U. S. 519, 528–529, especially in instances where, as here, the legislative history and

administrative background support the construction required by the terms of the statute.

The investigation involved herein is within the literal meaning and manifest intent of Section 235 (a).

2. Petitioner also contends (Pet. 11–14) that aid in securing compliance with the subpoena may be sought from a court only by a plenary action with all of the incidents of a full scale trial provided for in the Federal Rules of Civil Procedure. In particular, she cites the absence of service of summons on her (in addition to the subpoena) as constituting a fatal jurisdictional defect in the proceedings culminating in the order under review.

The procedure actually followed—application to the court for an *ex parte* order, personal service of the order, followed by a hearing with full opportunity to petitioner to raise objections—is in accord with the usual practice for judicial enforcement of administrative subpoenas.[1] Peti-

[1] Frequently in this type of proceeding when judicial enforcement of an administrative subpoena is sought, the court will issue a "show cause" order, followed by the rendition of a final order after hearing. Cf. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 190, fns. 2 and 3; *Durkin* v. *Fisher*, 204 F. 2d 930, 932 (C. A. 7); *United States* v. *Cream Products Distributing Co.*, 156 F. 2d 732 (C. A. 7); *Genecov* v. *Fed. Petroleum Board*, 146 F. 2d 596 (C. A. 5), certiorari denied, 324 U. S. 865. The procedure herein (*i. e.*, service of the June 2, 1954 *ex parte* order, followed by a hearing with full opportunity for contest, followed by a superseding order) is equivalent thereto. Cf. *Shotkin* v. *Nelson*, 146 F. 2d 402, 405 (C. A. 10).

tioner argues that such procedure is not authorized by Section 235 (a) because that section prescribes no special form of proceeding. That section, however, vests the Attorney General and officers of the Service with authority to "invoke the aid of any court of the United States" to secure enforcement of subpoenas, and also authorizes "any United States district court within the jurisdiction of which investigations or inquiries are being conducted" to issue an order in case of contumacy requiring the recalcitrant witness to appear and testify. This is the equivalent of the usual statutory language authorizing summary applications for court aid in support of administrative investigations (*cf., e. g., Penfield Co.* v. *Securities and Exchange Commission,* 330 U. S. 585, 587; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 200, fn. 24; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 503. *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, 360),[2] which has always been construed to authorize an expeditious application for court aid without resort to all the procedures normally incident to a common law trial. *United States* v. *Cream Products Distributing Co.,* 156 F. 2d 732 (C. A. 7); *Bowles* v. *Bay of New York Coal and Supply Corp.,* 152 F. 2d 330, 331 (C. A. 2); *Shotkin* v.

[2] An incomplete list of cognate statutory provisions is set forth at p. 41, fn. 28, Brief for the United States, *United States* v. *Minker,* No. 35, this Term.

Nelson, 146 F. 2d 402 (C. A. 10); *Goodyear Tire and Rubber Co.* v. *National Labor Relations Board,* 122 F. 2d 450 (C. A. 6); *Cudahy Packing Co.* v. *National Labor Relations Board,* 117 F. 2d 692, 694 (C. A. 10). As the court below held, the language of Section 235 (a) cited above brings this proceeding within the exception to Rule 81 (a) (3) of the Federal Rules of Civil Procedure providing that the rules "apply to proceedings to compel the giving of testimony * * * in accordance with a subpoena issued by an officer or agency of the United States * * * *except as otherwise provided by statute.*" [Italics added.] Where the authority to apply for judicial enforcement of an administrative subpoena is granted by special statute such proceedings are not controlled (except as to appeals) by the Federal Rules of Civil Procedure. *Bowles* v. *Bay of New York Coal and Supply Corp.,* 152 F. 2d 330, 331 (C. A. 2); *Genecov* v. *Fed. Petroleum Board,* 146 F. 2d 596, 598 (C. A. 5), certiorari denied, 324 U. S. 865; *Perkins* v. *Endicott Johnson Corp.,* 128 F. 2d 208, 226–227 (C. A. 2), affirmed, 317 U. S. 501.

Petitioner's other objections to the proceedings are equally without merit. While no summons was served on her, she had been served with a subpoena which she was apprised would be enforced by court order, and she was duly served with the initial order of the court. She had full opportunity to appear and did in fact appear to contest the validity of the subpoena. The court

therefore had jurisdiction over her and over the subject-matter of the suit. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 488; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 728–729; *Goodyear Tire and Rubber Co.* v. *N. L. R. B.*, 122 F. 2d 450 (C. A. 6); *Cudahy Packing Co.* v. *N. L. R. B.*, 117 F. 2d 692 (C. A. 10).

Petitioner also contends (apparently to buttress her assertion that a plenary action was required to be instituted to enforce compliance) that the court below erroneously rejected her theory that the instant action is "a *de novo* civil action" (Pet. 12–14). This is primarily a problem in semantics. The summary type of proceeding authorized here is independent in the sense that it is "a case or controversy" between the Service and the witness in regard to her legal obligation to testify which will, after hearing, terminate in a court order. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 488; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 38. Its institution and the subsequent assumption of jurisdiction by the court does not, however, preempt the authority of the administrative agency or open up for judicial decision the issues which are more properly reserved for the judgment of such agency in the first instance. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 214. It is a special type of proceeding presenting only the issue of the legitimacy of the subpoena, which may result only in the promulgation of

an order in aid of an administrative investigation, itself nonjudicial in nature. But the fact that it is a separate proceeding does not, independent of the governing statute, demand that all of the procedures normally incident to a plenary action at law be followed.

3. Finally, petitioner contends that the subpoena was not sufficiently specific and did not apprise her of the exact nature of the testimony that she would be called upon to give in the administrative proceeding. Since this was a personal subpoena to give testimony as a witness in a matter in which petitioner was not directly concerned, it is difficult to understand the basis of the objection. The subpoena did inform petitioner that her testimony was required in an investigation pursuant to Section 235 (a) of the Immigration and Nationality Act identified as "In re Henry Halsey Noyes and Gertrude Stedman Noyes", and it can hardly be contended that she was insufficiently apprised of at least the subject-matter of the investigation.[4]

[4] The power of an administrative agency to investigate and therefore the power to subpoena witnesses is not narrowly limited to issues already drawn in adversary litigation (*United Sttaes* v. *Morton Salt Co.*, 338 U. S. 632, 642–643), nor is it a prerequisite to forecast, prior to undertaking the investigation, even that the person under investigation is within the coverage of the applicable statute, *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 508–509, or that he or she has violated a law. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 216. An investigative subpoena is usually sustained unless the evidence it calls for is plainly irrelevant to any lawful purpose of the administrator in the discharge

Moreover, petitioner was informed by the government's application prior to the issuance of the final order appealed from (R. 3–4), "that the Immigration and Naturalization Service is conducting an investigation relating to the right or privilege of Henry Halsey Noyes and Gertrude Stedman Noyes to remain in the United States." It is difficult to perceive how the subject-matter of the investigation could be more fully described without announcing the results of the investigation in advance. Petitioner was informed of the names of the persons to be investigated, the precise subject of the investigation, and the statutory authority under which the investigation was being conducted.[4] This was sufficient to enable her to make any pertinent defense both in the enforcement proceeding, and before the Service investigator.

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of his duties. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509; *Kilgore Nat. Bank* v. *Fed. Petroleum Board*, 209 F. 2d 557, 560 (C. A. 5).

[4] Investigations of the possible deportability of persons are also controlled by the following regulation (8 C. F. R. 242.11):

"*Investigations*—(a) *Persons believed to be subject to deportation.* The case of every person believed to be subject to arrest and deportation shall be investigated by such officer as may be designated for that purpose.

"(b) *Purpose of investigation.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing that the person investigated is an alien and that he is subject to deportation."

CONCLUSION

The decision below is correct, and there is no conflict of decisions in the Courts of Appeals. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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